IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35133

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 606**
	)	
Plaintiff-Respondent,	)	**Filed: September 16, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
LARRY CRAWFORD,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Order denying motion to withdraw guilty plea, affirmed; order denying I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Larry Crawford appeals from the district court's orders denying his motion to withdraw his guilty plea and his Idaho Criminal Rule 35 motion for a reduction of his sentence. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

A criminal complaint was filed in March 2007 charging Crawford with four counts of lewd conduct with a minor under sixteen and one count of kidnapping for sexual acts, including intercourse, he committed against a twelve-year-old victim. Crawford retained an attorney and entered into plea negotiations. In July 2007, Crawford completed a guilty plea advisory form and subsequently entered a guilty plea to one count of lewd conduct with a minor under sixteen, Idaho Code § 18-1508, and the remaining charges were dismissed.

Thereafter, Crawford filed several *pro se* motions with the district court in an attempt to withdraw his guilty plea. The district court appointed counsel and a hearing was held on Crawford's motion. At that hearing, Crawford argued that he should be allowed to withdraw his guilty plea because his retained attorney threatened to withdraw if Crawford insisted on going to trial, thereby coercing him into pleading guilty. The district court denied Crawford's motion to withdraw his plea and proceeded to sentencing. Crawford was sentenced to a unified term of twenty-five years, with a minimum period of confinement of eight years. Crawford filed a Rule 35 motion for reduction of his sentence and presented a letter he had written to his appointed attorney to aid with sentencing. The district court denied Crawford's Rule 35 motion. Crawford appeals, challenging the denial of his motion to withdraw his guilty plea and the denial of his Rule 35 motion.

II.
ANALYSIS

A. Motion to Withdraw Guilty Plea

Crawford asserts several allegations of error in the district court's denial of his motion to withdraw his guilty plea. Whether to grant a motion to withdraw a guilty plea lies in the discretion of the district court and such discretion should be liberally applied. *State v. Freeman*, 110 Idaho 117, 121, 714 P.2d 86, 90 (Ct. App. 1986). Appellate review of the denial of a motion to withdraw a plea is limited to determining whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *Id.* Also of importance is whether the motion to withdraw a plea is made before or after sentence is imposed. Idaho Criminal Rule 33(c) provides that a plea may be withdrawn after sentencing only to correct manifest injustice, whereas a guilty plea may be withdrawn before sentencing for a "just reason." *State v. Mayer*, 139 Idaho 643, 647, 84 P.3d 579, 583 (Ct. App. 2004). Nevertheless, presentence withdrawal of a guilty plea is not an automatic right and the defendant bears the burden of proof. *State v. Rose*, 122 Idaho 555, 559, 835 P.2d 1366, 1370 (Ct. App. 1992).

First, Crawford argues that the district court abused its discretion by employing an incorrect legal standard when reviewing his motion to withdraw his guilty plea. Specifically, Crawford contends the district court mixed the standards of review and employed the constitutional standard (used in determining whether a plea was knowing, intelligent, and voluntary), the manifest injustice standard (used when a plea is attempted to be withdrawn after

sentencing), and the just reason standard. Crawford's motion to withdraw his guilty plea was filed before he viewed the contents of the presentence investigation report (PSI) and before his sentence was imposed. Therefore, the district court was required to determine whether Crawford had demonstrated a just reason to withdraw his plea. *See Mayer,* 139 Idaho at 647, 84 P.3d at 583.

At the hearing on Crawford's motion to withdraw his guilty plea, he argued that because he was attempting to withdraw his plea before viewing the PSI and before sentencing, the correct standard was a just reason. Neither Crawford nor the state argued any other standard was applicable at that hearing and there is no indication from the transcript that the district court was confused about the proper standard or the timing of Crawford's motion. Additionally, the conclusion of the standard of review section of the district court's order denying Crawford's motion to withdraw his guilty plea read:

> The scope of this court's discretion is affected by the timing of the motion. Where the motion is filed before sentencing, the defendant need only show a "just reason" for withdrawing the plea. I.C.R. 33(c); *State v. Ballard,* 114 Idaho 799, 801, 761 P.2d 1151, 1153 (1988); *State v. Dopp,* 124 Idaho 512, 516, 861 P.2d 82, 86 (Ct. App. 1992). The court is also allowed to "temper its liberality" in these cases "by weighing the defendant's apparent motive." *State v. Mayer,* 139 Idaho at 647, 84 P.3d at 583. "A defendant's failure to present and support a plausible reason will dictate against granting withdrawal, even absent prejudice to the state." *Id.*

The district court's order further articulated that "all of the relevant surrounding circumstances establish that Mr. Crawford was aware of the nature of the offense to which he pled guilty and that he was not coerced." The district court's order concluded with "Crawford has not stated a plausible reason supporting withdrawal of his guilty plea."

Admittedly, the district court's order also addresses the constitutional standard of a knowing, intelligent and voluntary plea. The knowing, intelligent and voluntary plea standard is very similar to the standard for accepting a guilty plea found in Idaho Criminal Rule 11(c).[1] This

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[1] Idaho Criminal Rule 11(c) provides:

> Acceptance of Plea of Guilty. Before a plea of guilty is accepted, the record of the entire proceedings, including reasonable inferences drawn therefrom, must show:
>
> (1) The voluntariness of the plea.

Court has previously held in a case involving the denial of a defendant's motion to withdraw a guilty plea pursuant to the just reason standard that "a threshold question is whether the plea of guilty was knowingly, intelligently and voluntarily made." *State v. Rodriguez,* 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990). In addition, Crawford's sole argument before the district court was that he should be allowed to withdraw his plea because his attorney coerced him into pleading guilty. Therefore, the district court did not err in also addressing whether Crawford's plea was knowing, intelligent and voluntary. It is clear from a review of the record that the district court was aware of the timing of Crawford's motion and that it concluded Crawford had not supported that motion with a just or even plausible reason for withdrawing his plea.

Next, Crawford argues that the district court abused its discretion by accepting a plea that was not in compliance with Rule 11[2] and that the district court erred by relying on his statements

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> (2) The defendant was informed of the consequences of the plea, including minimum and maximum punishments, and other direct consequences which may apply.
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> (3) The defendant was advised that by pleading guilty the defendant would waive the right against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses against the defendant.
>
> (4) The defendant was informed of the nature of the charge against the defendant.
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> (5) Whether any promises have been made to the defendant, or whether the plea is a result of any plea bargaining agreement, and if so, the nature of the agreement and that the defendant was informed that the court is not bound by any promises or recommendation from either party as to punishment.

[2] In addition to arguing Crawford's plea did not comply with the requirements in Rule 11(c), Crawford also argues that his plea did not comply with Rule 11 (e), which provides:

> Plea Advisory Form. As an aid in taking a plea of guilty, the court may require the defendant to fill out and submit the plea advisory form found in Appendix A of these rules. In addition to the form, the court must make a record showing:
>
> (1) The defendant understands the nature of the charge(s), including any mental element such as intent, knowledge, state of mind;
>
> (2) The defendant understands the maximum and minimum punishments, and any other direct consequences which may apply;
>
> (3) The defendant understood the contents of the guilty plea advisory form, and the defendant's plea is voluntary.

during the plea colloquy because those statements could have been the product of coercion. We will address each argument in turn.[3]

Crawford argues that his plea was not taken in compliance with Rule 11(c) and (e) because the district court failed to discuss several of Crawford's affirmative answers on the guilty plea advisory form with him at the change of plea hearing.[4] We acknowledge that, although the district court did discuss several of Crawford's answers from the guilty plea form with him at the change of plea hearing, it failed to specifically question him about four of his affirmative responses. However, the district court did ask Crawford whether he was under the influence of drugs or alcohol and whether there was anything going on in his life that would affect his ability to understand the proceedings. Crawford responded negatively. Crawford was also asked whether there was any additional discovery that should have been performed and he replied that there was not. Crawford stated that no one had threatened him to get him to plead guilty and assured the district court several times that his plea was voluntary and not coerced. In addition, as the guilty plea colloquy below indicates, the district court painstakingly questioned

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[3] The state contends that Crawford cannot argue for the first time on appeal that his plea was not taken in compliance with Rule 11 and that this Court should only review Crawford's claim that his plea was coerced by his attorney's threat to withdraw--the only claim Crawford presented to the district court. However, because we conclude that the district court followed the mandate of Rule 11, we need not resolve this dispute on appeal.

[4] The district court did not discuss the following four questions with Crawford at his change of plea hearing despite his having affirmatively answered them on the guilty plea advisory form:

> 6. Have you ever been diagnosed with a mental health disorder?
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> . . . .
>
> 9. Is there any other reason that you would be unable to make a reasoned and informed decision in this case?
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> . . . .
>
> 16. Have any other promises been made to you which have influenced your decision to plead guilty?
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> . . . .
>
> 22. Have you told your attorney about any witnesses who would show your innocence?

Crawford about the factual basis for his plea and even reassured Crawford that the court was not "in any way here to coerce [him] into pleading guilty."

Despite the district court's failure to cover some of the specific questions Crawford answered affirmatively on the guilty plea advisory, the district court covered the general content of those questions with Crawford in the colloquy. Furthermore, the district court went to great lengths to ensure that there was a factual basis for Crawford's plea, that Crawford understood the charges and the potential penalties, and that Crawford's plea was voluntary. We conclude that Crawford has not shown an abuse of discretion by the district court for an alleged failure to comply with the requirements of Rule 11.

Crawford also argues that he presented a just reason for withdrawing his plea--he was coerced into pleading guilty by his attorney's threat to withdraw if Crawford chose to go to trial. This was the only reason Crawford presented to the district court in support of his motion to withdraw his guilty plea.[5] A criminal complaint was filed in this case charging Crawford with four counts of lewd conduct with a minor and one count of kidnapping. After negotiations, Crawford agreed to plead guilty to one count of lewd conduct and the other charges were dismissed. Additionally, the state agreed that, if the PSI recommended probation and the psychosexual evaluation showed that Crawford was amenable to treatment, the state would not present a specific recommendation at sentencing and would not oppose probation. At Crawford's change of plea hearing, he completed a guilty plea advisory form. Thereafter, the district court questioned Crawford about the rights he was waiving by pleading guilty, the maximum penalty, and some of the answers Crawford had given on that questionnaire. During the change of plea hearing the following exchange occurred:

> THE COURT: Now, it indicates on the form that you have asked your attorney to bring up past conduct of the victim, give the victim the same treatment as you, give the mother of the victim a test for STDs, fingerprint evidence, interview other men involved. Do you recognize that by pleading guilty, that you are waiving the right to have any of those things completed?
> [CRAWFORD]: Yes.
> THE COURT: And that while your attorneys may be able to continue to investigate the case pending sentencing, that any value--I'm not saying any of

[5] Both Crawford's retained attorney, who allegedly coerced him into pleading guilty, and Crawford's appointed attorney, who argued his motion to withdraw his guilty plea, advised Crawford that he should not attempt to withdraw his plea.

those things would have value--but any potential value those would have can at best be used at sentencing. Do you understand that?
[CRAWFORD]: Yes.
THE COURT: Knowing that, are you willing to proceed and to give up your right to have those things completed at this time?
[CRAWFORD]: Yes.
. . . .
THE COURT: Do you feel in any way that you are being compelled or coerced--
[CRAWFORD]: No.
THE COURT: --to enter this guilty plea today? I'm sorry?
[CRAWFORD]: No.
THE COURT: You're doing so voluntarily?
[CRAWFORD]: Yes.
THE COURT: And other than what's been discussed by the state's attorney and [your attorney], has anyone made any other promises to you that haven't been mentioned?
[CRAWFORD]: Nope.
THE COURT: Has anyone threatened you or anyone close to you to get you to plead guilty?
[CRAWFORD]: No.
. . . .
THE COURT: Tell me why you're guilty, sir?
[CRAWFORD]: Because I made a statement in court that I can't retract. It was an unfortunate statement, bad choice of words.
THE COURT: Well, did you or did you not commit the crime?
[CRAWFORD]: Yes.
THE COURT: You had genital-to-genital contact with a 12-year-old girl?
[CRAWFORD]: That's what I am being accused of, yes.
THE COURT: I know that. Did you do it or not.
[CRAWFORD]: Yes. I--
THE COURT: Mr. Crawford, I sense a lot of hesitation, and I'm not in any way here to coerce you into pleading guilty if you didn't do this crime. We have a trial set next week, and I'm more than prepared to proceed. So I need to know whether you did or didn't do this.
[CRAWFORD]: Yes.
THE COURT: If you didn't do it--
[CRAWFORD]: I did do it. Okay?
THE COURT: Okay. So, to finish my sentence, if you didn't do this crime, we're more than happy to proceed to trial. Whether you made statements that can't be retracted or whether or not someone else did anything else, I can't tell you. But I need to know whether you indeed had contact with a 12-year-old girl?
[CRAWFORD]: Yes, there was contact.
THE COURT: Genital-genital contact; is that right?
[CRAWFORD]: Yes.

Crawford's *pro se* motions to withdraw his guilty plea provide that his retained attorney told a secretary to tell Crawford that the attorney would withdraw if Crawford refused to plead guilty. Crawford also produced a letter written by his attorney and addressed to Crawford that referred to his case as a "slam dunk," informed Crawford that he likely would receive a ten-year determinate sentence and up to life if he was found guilty, and that his attorney could not proceed to represent him at sentencing without an additional $2,000.

The district court began its order denying Crawford's motion by noting that the only argument Crawford made in support of his motion to withdraw his plea was that he was coerced by his attorney's advice. Therefore, the district court framed the issue as "whether the statements made by [defense counsel] as contained in [the letter defense counsel wrote to Crawford] undermine the defendant's voluntariness to such a degree as to warrant Crawford's withdrawing his guilty plea." The district court's order continued:

> The court has reviewed [the letter from defense counsel to Crawford] and the court is aware of the statements made regarding the alleged "slam dunk" nature of the state's case. The court accords some weight to Mr. Crawford's claim that such statements, along with the statement made through a secretary on Friday afternoon, three days before the change of plea on July 15 (a Monday) could be construed, via hindsight, as minimally coercive.
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> The problem the court has in according much weight to Mr. Crawford's statements is that Mr. Crawford repeatedly, both in the written guilty-plea advisory, as well as orally, under oath, assured the court that his plea was made voluntarily, and without any type of coercion whatsoever. To allow Mr. Crawford to now assert that he was coerced in contravention of his sworn testimony at the change-of-plea hearing would fly in the face of his statements given knowingly and voluntarily to this court.
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> . . . .
>
> Beyond that, the court concludes from an objective point of view, [the defense attorney's] advice and conduct did not amount to coercion sufficient to undermine the plea process in this case. A review of [the letter] sets forth that [the defense attorney] "strongly recommend[ed]" that Crawford accept the state's plea offer which allowed an avenue to argue for probation. The letter is dated July 12, four days before the change of plea hearing; Crawford had been charged with four counts of lewd conduct with a twelve-year-old child, as well as one count of first degree kidnapping; Crawford had made two statements admitting to sexual contact with the minor child *before* admitting to such conduct while under oath at the change of plea hearing; [defense counsel's] letter noted that "if we have a favorable psychosexual and PSI, you are going to get a probation and not be locked up, especially considering the amount of time you have already spent in jail"; and finally, that if Crawford rejected the plea offer, "because of the fact that

> you are in denial, and if the jury convicts you, the judge will give you no less than a fixed 10 years to life."
> These statements are couched as [defense counsel's] opinions. The statements in the letter are hard-hitting and direct; however, they present the reality of what a person accused of lewd conduct may face if they go to trial and lose–particularly in a case where, again, Crawford had made two potential admissions to a sexual relationship with a twelve-year-old girl before deciding to change his plea to guilty.
> The court concludes that Mr. Crawford's desire to withdraw his plea, made nearly four weeks after his guilty plea was accepted by this court, is couched more in terms of a realization of the ultimate consequence that may await Mr. Crawford, rather than being based upon any actual coercion on [defense counsel's] part.

In addition, the district court's order denying Crawford's motion contains a significant review of the plea advisory form Crawford completed, as well as the discussion that took place at the hearing where Crawford entered his guilty plea.

Although Crawford relies on cases from other jurisdictions for the proposition that counsel's threat to withdraw may render a guilty plea involuntary, the Idaho Supreme Court has recognized that "if counsel feels that they cannot support a client's choice [to proceed to trial], that counsel should be allowed to withdraw, without then rendering a client's subsequent decision to enter into a guilty plea, involuntary." *Hollon v. State,* 132 Idaho 573, 577, 976 P.2d 927, 931 (1999). The *Hollon* case was in the context of ineffective assistance of counsel, but it involved a threat by counsel to withdraw if Hollon refused to plead guilty. The Court determined that counsel's threat to withdraw did not render his representation ineffective. *Id.* at 578, 976 P.2d at 932.

In this case, the district court carefully explored Crawford's guilty plea. The district court specifically asked Crawford if he was being compelled or coerced into pleading guilty and whether his guilty plea was voluntarily. Crawford responded to the district court repeatedly that he was not coerced, his plea was voluntary and he admitted the factual basis for the crime. *See State v. Lavy,* 121 Idaho 842, 844-45, 828 P.2d 871, 873-74 (1992) (holding no abuse of discretion in denial of motion to withdraw a guilty plea where, in order to believe the defendant's assertions on appeal, the trial court would have to ignore the record and the defendant's own statements regarding the plea agreement). Consequently, we conclude that there was no abuse of discretion by the district court in determining Crawford failed to demonstrate a just reason to withdraw his guilty plea.

Finally, Crawford contends that, in addition to showing a just reason for withdrawal of his guilty plea, the state did not assert that it would be prejudiced by such a withdrawal. We already have concluded that the district court did not abuse its discretion in determining Crawford failed to articulate a just reason. Furthermore, this Court has noted that "failure of a defendant to present and support a plausible reason for withdrawing the guilty plea, even absent prejudice to the prosecution, militates against granting the motion." *Nellsch v. State*, 122 Idaho 426, 431, 835 P.2d 661, 666 (Ct. App. 1992). Accordingly, it was unnecessary for the state to allege or prove that it would be prejudiced by Crawford's withdrawal of his guilty plea.

B. Idaho Criminal Rule 35

Crawford was sentenced to a unified term of twenty-five years, with a minimum period of confinement of eight years, for lewd conduct with a minor under sixteen. Crawford argues that the district court abused its discretion when it denied his Rule 35 motion for reduction of sentence.

A motion for reduction of sentence under Rule 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984).

In support of his Rule 35 motion, the only new information submitted by Crawford was a letter he wrote to his attorney, which provided:

> I just remembered something that might help in my appeal. In the year of 2006 I was diagnosed with a mental disorder called impulse reaction disorder. I am susposed [sic] to take a medication called depacote, which I have not taken since December of 2006. I lost my medical insurance when I moved to Idaho and have not been on my medication since. This can be verified through Dr. Robert Bixler & medical records in Modesto CA. I have the adress [sic] for Dr. Bixler in my records at home. It was in the spring of 2006 when I was diagnosed.

The district court entered a detailed, four-page order denying Crawford's Rule 35 motion. That order recounts the correct legal standards governing Rule 35 motions, contains significant detail about Crawford's case and concludes:

> The Court conducted an extensive sentencing hearing whereby certain findings were made. The record of those hearings is incorporated herein by reference. At sentencing, the court considered a large number of reports, letters, and other documents regarding the defendant's prior history, character, mental health, psychosexual condition, etc. Considering the court's significant amount of information regarding the defendant's mental health at the time of sentencing, the court made its sentencing determination after becoming very well-informed about [the] defendant. Accordingly, the newly presented information that defendant was allegedly suffering from Impulse Reaction Disorder in 2006 does not present any sort of mitigating factor that would cause the court to be more lenient on the defendant.

On appeal, Crawford contends that his sentence is excessive given the new information he submitted about a mental health disorder diagnosis, his limited criminal history, his willingness to participate in treatment and his strong family support. The district court considered Crawford's criminal history, willingness to participate in treatment and family support when it originally sentenced him. Despite those mitigating factors, the district court determined that Crawford needed a substantial prison term because of his denial, his lack of remorse, the nature of the crime and the psychosexual evaluation, which rated Crawford as being at a high risk to reoffend. We conclude the district court did not err in denying Crawford's Rule 35 motion for reduction of sentence.

III.

CONCLUSION

The district court did not abuse its discretion in denying Crawford's motion to withdraw his guilty plea or in denying Crawford's Rule 35 motion for reduction of his sentence. Accordingly, the order denying Crawford's motion to withdraw his guilty plea and the order denying his Rule 35 motion for reduction of his sentence for lewd conduct with a minor are affirmed.

Judge PERRY and Judge GRATTON **CONCUR**.